

The Court of Appeals remanded this matter to the Board for reconsideration of its determination of the claim, instructing the Board to take into account all of the evidence in the record, specifically including respondent's depositions not previously considered.

Claimant argues the testimony of Dr. Do remains the most persuasive and the Board's prior 70 percent permanent partial general disability award from its June 18, 2012, Order should be entered as the final award herein.

Respondent contends, when viewed in its entirety, the evidence supports the ALJ's finding that claimant has only an impairment to his right shoulder and not to the body as a whole.

The issue is the nature and extent of claimant's impairment, and specifically whether claimant sustained permanent impairment to the body as a whole related to the work accident, or whether claimant's injuries are limited to the right upper extremity at the level of the shoulder.

FINDINGS OF FACT

Claimant has been incarcerated since 1986 on a first degree murder conviction. He was at Lansing State Penitentiary from 1988 until 1992, and then was transferred to the El Dorado Correctional Facility. Claimant testified that the El Dorado facility offers opportunities for employment within the prison and one of those opportunities is with respondent Century Manufacturing (Century). Claimant began working for Century on August 1, 1997. His job title was a lathe operator and he also did some soldering and packaging work.

On or about June 4, 2007, while working for Century, claimant suffered an accident when he tripped over a wooden box frame and fell onto a cement floor, injuring his right shoulder, neck and wrist. Claimant testified that he had been setting up the wood lathe and reached around to grab some tools when his foot caught the edge of the box and flipped over it. The box was 12 to 18 inches high.

Claimant testified that this accident was witnessed by Donny Bruce, another inmate and employee of Century. Claimant reported the incident to Kevin Lemaster, David White, and someone named Jamie the same day. Claimant did not ask about getting medical treatment because he didn't feel that it was that serious at the time. He did however leave work early.

The next day, claimant came to work and was unable to handle a wrench. He was escorted to the clinic because the pain in his neck and shoulder was so bad he couldn't stand it. Claimant met with the doctor and was taken off work until he could be seen by board certified orthopedic surgeon, J. Mark Melhorn, M.D., the workers compensation doctor. Claimant was off work for 7½ weeks.¹

¹ R.H. Trans. at 9.

Claimant first met with Dr. Melhorn on March 28, 2006, on referral for an earlier work-related injury. Dr. Melhorn diagnosed right and left carpal tunnel syndrome and right and left lateral epicondylitis. He assigned a 7.7 percent permanent partial impairment to the right arm and a 7.7 percent permanent partial impairment to the left arm for a total whole body impairment of 9.24 percent.

Claimant came under Dr. Melhorn's care again in July 2007 after the injury occurred on June 4, 2007. Claimant complained of pain in the right upper extremity (arm, elbow, shoulder) and neck. X-rays were ordered and revealed some age-related changes at C5-6. The shoulder appeared to have no significant change other than arthritis in the AC joint, consistent with age. X-rays of the wrist showed the previous old injury and subsequent degenerative changes in the wrist. There was no new acute component.

Claimant's symptoms continued to the October 5, 2007, examination, with his main complaints being pain in the right hand, forearm and into the elbow, plus pain in the right shoulder and neck. Claimant returned for an examination on October 24, 2007. Claimant felt that the medication he was prescribed was helping to decrease his symptoms. During the November 9, 2007, examination, claimant reported the medication had decreased his symptoms on the right. Claimant reported the medication was also helping his ankles, knees and feet. At the November 30, 2007, evaluation, claimant reported benefit from the medication, while still having right shoulder problems. On December 21, 2007, claimant continued to have neck and shoulder discomfort.

Dr. Melhorn provided claimant with treatment, including injections in his right shoulder. Claimant testified that he continually complained of pain in his neck and asked for an MRI of the neck, but was refused when Dr. Melhorn said that there was nothing wrong with his neck and they would save money by not getting the MRI.²

Claimant was not seen again until May 16, 2008, by which time Dr. Melhorn had been appointed as claimant's treating physician. Claimant's complaints at that time were pain in the neck and right shoulder. These were two of the same complaints Dr. Melhorn had been treating claimant for since 2007.

Dr. Melhorn last met with claimant on November 13, 2008, at which point claimant was found to be at maximum medical improvement. In December 2008, Dr. Melhorn opined that claimant did not have any additional permanent physical impairment for his subjective complaints.

Dr. Melhorn opined that claimant had an inconsistent pattern of consistent complaints involving the shoulder and neck. He testified that it is possible for someone to

² R.H. Trans. at 10.

have some degree of arthritis that would be demonstrated on an x-ray that may not clinically correlate with the individual's subjective complaints.³

Dr. Melhorn opined that claimant's accident in June 2007 was not enough to aggravate or exacerbate claimant's preexisting degenerative conditions. The fall described by claimant involved a fall onto a concrete floor of from 12-24 inches. Dr. Melhorn testified that high-level impact falls, even onto concrete, are not considered significant until they are in the six foot range.⁴

Had claimant not already had symptoms in his neck and shoulder from the accident, he would have developed them due to his age. When asked about clicking and grinding in claimant's neck, Dr. Melhorn testified those symptoms may stem from claimant's arthritic changes in his neck. However, when Dr. Melhorn asked claimant to reproduce those symptoms, claimant was unable to do so.

Claimant became unsatisfied with his treatment with Dr. Melhorn and was referred to board certified orthopedic surgeon Pat D. Do, M.D., although, Dr. Do was not initially authorized to treat the claimant. Claimant met with Dr. Do, on April 25, 2009, for an examination. Claimant's complaints were pain in the neck and right shoulder with difficulty turning his neck or raising his right arm above his head. Claimant was examined and found to have neck pain with right upper extremity radicular symptoms, right shoulder pain with impingement and myofascial pain. Dr. Do felt that claimant needed to have an MRI of the right shoulder and cervical spine and recommended physical therapy. He also thought claimant might benefit from trigger point or epidural injections. Depending on the results of the MRI, claimant might be a candidate for shoulder surgery. Dr. Do became claimant's authorized treating physician on November 17, 2009.

An MRI was performed on claimant's cervical region on August 11, 2010. The test impression included moderate spondylotic changes at C5-6 and C4-5 with mild posterior ridging and narrowing at the anterior subarachnoid space. There was no evidence of pressure on the spinal cord or nerve roots. There was mild to moderate anterior spurring at C4-5. Dr. Do continued to follow claimant's progress and determined from the August 11, 2010, MRI that claimant had generalized wear and tear in the neck. He did not believe that the degenerative condition in claimant's neck would be causally related to claimant's work accident.

Because the MRI of the right shoulder indicated impingement and a partial rotator cuff tear, Dr. Do performed right shoulder surgery (rotator cuff repair, arthroscopy with

³ Melhorn Depo. at 19.

⁴ Melhorn Depo. at 27.

extensive debridement, and right shoulder decompression) on claimant on April 14, 2010.

Claimant was found to be at maximum medical improvement for the right shoulder and cervical spine on February 1, 2011, and was assigned permanent work restrictions. Pursuant to the AMA Guides, 4th ed., Dr. Do assigned claimant a 5 percent whole person impairment for the cervical spine and an 8 percent permanent partial impairment to the right upper extremity. He combined both impairments for a 10 percent whole person impairment.⁵

Dr. Do testified that it was possible that the pain complaints in claimant's neck were being caused by a degenerative condition in the cervical spine. If this was truly the case, then he did not feel that claimant's cervical spine degeneration was causally related to his work accident. He opined that the 5 percent whole person impairment he assigned to the cervical spine was a minor impairment for myofascial pain in the neck area.⁶ He opined that claimant's accident may have aggravated the cervical spine myofascial pain condition. When asked whether the impairment of function ratings were, within a reasonable medical probability, related to the traumatic injury suffered in June 2007, with respondent, he stated "If his history's true, yes."⁷

Vocational expert Steve Benjamin interviewed claimant for a vocational assessment and determined that claimant performed 31 tasks over the last 15 years. Dr. Do reviewed the task list of Mr. Benjamin and opined that out of 31 non-duplicated tasks claimant performed over the last 15 years, claimant can no longer perform 13 tasks for a 42 percent loss. Dr. Do believes that claimant is capable of going back to work as long as he stays within the restrictions assigned to him.

Claimant testified that he doesn't have as much strength as he had before the accident and has a hard time picking up and carrying things. He depends a lot on his left arm. He testified that his arms get numb and tingly a lot and he is always hurting. He wakes up in the middle of the night. He also developed a burning and biting sensation after his right shoulder surgery.⁸

At the regular hearing, claimant testified that he was off work for about seven and a half weeks after the fall, until he saw Dr. Melhorn. As noted above, claimant was first examined by Dr. Melhorn for this accident on July 27, 2007, or 7.57 weeks later. Claimant then returned to work for respondent and last worked for respondent in 2008, "around

⁵ Do Depo., Ex. 7 at 1 (March 10, 2011, letter).

⁶ Do Depo. at 27.

⁷ Do Depo. at 16.

⁸ R.H. Trans. at 39-40

September” and remained off work until early January of 2009.⁹ At that time, claimant began performing custodial work for the prison. That job paid \$1.05 per day with claimant working three to four hours per day five days per week.

Tommy McKay, plant manager for Century Manufacturing, testified that the company is located within the confines of El Dorado Correctional Facility and gets its labor force from the correctional facility at the facility’s discretion. Mr. McKay testified the company has a little less than 60 employees. With the exception of supervisors, all respondent employees are inmates of the correctional facility. All hiring must be done with the approval of the Department of Corrections. Mr. McKay is on-site daily. The inmates are paid an hourly wage, but receive no additional fringe benefits.

Claimant was an employee of respondent at the time Mr. McKay came to respondent’s facility in El Dorado. Claimant worked in the pewter department and did soldering and occasionally worked on a lathe. At some point, Mr. McKay became aware of claimant’s work-related injury from the June 4, 2007, accident. The accident occurred when claimant tripped over the wall of a wooden box where he was working and fell on a cement floor. Claimant did not make a claim for compensation at that time.¹⁰

Claimant’s employment was terminated in March 2008, due to a massive loss of work and respondent having too many employees. At the time of the layoff, respondent was almost completely shut down. Mr. McKay described claimant as an adequate employee. He testified that when claimant started working for the company he was a good employee. However, after claimant’s parole was denied, claimant seemed to have a chip on his shoulder.¹¹

Mr. McKay testified that he is not usually notified when an inmate is taken off work for an injury or any other reason for that matter. He would sometimes find out from the inmates when they would return to work. He did receive deposition exhibit Nos. 1 & 2 which were identified as Temporary Medical Work Restriction forms on claimant. Exhibit Nos. 3 & 4 were also identified as work restriction forms, although they were computer generated forms rather than the hand-written forms provided earlier. Additionally, exhibit Nos. 3 & 4 contained specific restrictions while Nos. 1 & 2 only discussed the inmate being “laid in” for a specific number of days.

Mr. McKay knows nothing about the workers compensation process other than if an accident is reported to him he fills out a report, forwards it on to personnel and the worker is sent to the prison clinic.

⁹ R.H. Trans. at 11. (Note: October 1, 2008 through January 2, 2009 = 13.43 weeks)

¹⁰ McKay Depo. at 12.

¹¹ McKay Depo. at 13.

At respondent's request, claimant met with board certified preventive and emergency medicine specialist, John F. McMaster, M.D., for an examination on September 7, 2011. Claimant complained of ongoing pain in the right shoulder and neck. Dr. McMaster determined that claimant was suffering from or suffered from transient non-specific right upper extremity pain as a result of the June 4, 2007 incident. Dr. McMaster examined claimant and his medical records and presented his diagnosis as follows:

1. Status post fall in the workplace, 06-04-07
2. Transient non-specific right upper extremity pain, incident related/resolved
3. Cervical spondylosis/degenerative disks, non-incident related
4. Chronic right upper extremity pain, non-incident related
 - a. Status post right upper extremity impairment secondary to CTS/UNE
 - b. Right shoulder impingement, non-incident related
 - c. Status post right shoulder arthroscopy, 04-14-10¹²

When claimant met with Dr. McMaster he was still complaining of residual pain related to the incident. Claimant denied any previous history of pain or discomfort in his neck and shoulder similar to the pain he experienced after the fall.¹³ Dr. McMaster did not feel that claimant's accident was the reason for his rotator cuff surgery in April 2010 with Dr. Do.

Dr. McMaster opined that, based on a reasonable degree of medical certainty, the forces incurred as a direct result of claimant's accident fell within the limits of harmlessness and did not cause or result in any permanent alteration or derangement to claimant's preexisting bony or soft tissue pathoanatomy. No impairment or restrictions were assigned.

Dr. McMaster did not believe that claimant's current complaints were related to an injury arising out of and in the course of claimant's employment and the alleged work-related accident.¹⁴ He found claimant's current complaints to be related to other events, psychosocial circumstances, and the natural aging process. He acknowledged that it was possible for a patient to have preexisting degenerative condition in the spine and be asymptomatic and then suffer a slip and fall and suddenly have pain and problems that, in part, relate to the degenerative condition.¹⁵

¹² McMaster Depo., Ex. 2 (September 7, 2011, IME Report at 1).

¹³ McMaster Depo. at 34.

¹⁴ McMaster Depo. at 23.

¹⁵ McMaster Depo. at 43.

Dr. McMaster found claimant to have a zero percent permanent impairment and declined to impose restrictions.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-501(a) states:

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

The Board, in its initial Order of June 18, 2012, excluded substantial evidence presented by respondent due to the failure of respondent to properly request and accomplish an extension of its terminal dates. The Kansas Court of Appeals, in its decision of July 26, 2013, remanded the matter to the Board with instructions for the Board to consider all evidence offered, including the depositions of Dr. Melhorn and Dr. McMaster.

The initial Order from the Board determined that claimant had suffered injuries to both his right upper extremity and neck. However, the medical opinions of Dr. Melhorn and Dr. McMaster find the problems associated with claimant's cervical spine to be related to claimant's ongoing degenerative process and not the accident of June 4, 2007. While it is noted that Dr. McMaster was hired by respondent, Dr. Melhorn was the assigned treating physician for claimant for a period of nearly 1½ years. Thus, Dr. Melhorn had the opportunity to observe claimant's physical condition, review a multitude of tests performed on claimant and observe claimant's ongoing complaints. He ultimately determined claimant had not aggravated or exacerbated his degenerative condition in his cervical spine as the result of the fall on June 4, 2007.

Even Dr. Do, claimant's original treating physician, found claimant's degenerative condition had not been causally affected by the work-related fall. Dr. Do assigned claimant a cervical functional impairment based upon a finding of myofascial pain syndrome. Neither Dr. Melhorn nor Dr. McMaster found myofascial pain syndrome associated with claimant's work accident. The Board finds the opinions of Dr. Melhorn and Dr. McMaster to outweigh that of Dr. Do in this regard.

The Board, after considering the entire record, finds claimant's accident on June 4, 2007, caused permanent injury to claimant's right upper extremity at the shoulder, but did not cause injury to claimant's degenerative conditions in his cervical spine.

K.S.A. 44-510e (Furse 2000) states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.¹⁶

K.S.A. 44-510d(b) (Furse 2000) states:

Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510h and 44-510i and amendments thereto, and no additional compensation shall be allowable or payable for any temporary or permanent, partial or total disability, except that the director, in proper cases, may allow additional compensation during the actual healing period, following amputation. The healing period shall not be more than 10% of the total period allowed for the scheduled injury in question nor in any event for longer than 15 weeks. The return of the employee to the employee's usual occupation shall terminate the healing period.

The Board finds the medical opinion of Dr. Do regarding claimant's injury to his right upper extremity at the shoulder to be the most persuasive. Claimant's award is modified to grant claimant an 8 percent functional impairment to the right shoulder. Claimant's entitlement to a permanent partial general disability award is reversed.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant an 8 percent functional impairment to his right upper extremity at the level of the shoulder. The prior award of a permanent partial general disability to the whole person is reversed and the original Award of the ALJ from January 9, 2012, is affirmed.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Board's Order dated June 18, 2012, is reversed with regard to the prior award of a permanent

¹⁶ K.S.A. 44-510e(a).

partial general disability and claimant is awarded an 8 percent functional impairment to the right upper extremity at the level of the shoulder.

Claimant is entitled to 7.57 weeks of temporary total disability at the rate of \$222.25 per week, totaling \$1,682.43, followed by 17.39 weeks of compensation at the rate of \$222.25 per week, totaling \$3,864.93, for a total award of \$5,547.36. As of the date of this order, the entire award is due and owing and ordered paid in one lump sum, minus amounts previously paid. Any overpayment by respondent in this matter may be presented to the Director pursuant to K.S.A. 2006 Supp. 44-556(e).

IT IS SO ORDERED.

Dated this _____ day of January, 2014.

BOARD MEMBER

BOARD MEMBER

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